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Insurance Company

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

NEW YORK MARINE AND
GENERAL INSURANCE COMPANY,
a New York corporation,,

Plaintiff,

v.

AMBER HEARD, an individual,,

Defendant.

AMBER HEARD, an individual

Counter-claimant

v.

NEW YORK MARINE AND
GENERAL INSURANCE
COMPANY, a New York corporation,

Counter-defendant

Case No. 2:22-cv-04685-GW(PDx)

**PLAINTIFF AND COUNTER-
DEFENDANT NEW YORK
MARINE AND GENERAL
INSURANCE COMPANY'S
NOTICE OF MOTION AND
MOTION TO (1) DISMISS
HEARD'S COUNTERCLAIM
PURSUANT TO RULE 12(b)(6), OR
(2) ALTERNATIVELY, FOR A
MORE DEFINITE STATEMENT
PURSUANT TO RULE 12(e), AND
(3) TO STRIKE CERTAIN
ALLEGATIONS PURSUANT TO
RULE 12(f)**

Date: March 13, 2023
Time: 8:30 a.m.
Judge: Hon. George H. Wu
Courtroom: 9D

Filed Concurrently with Memorandum
of Points and Authorities; Declaration
of James P. Wagoner; Request for
Judicial Notice; Proposed Order

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on March 13, 2023 at 8:30 a.m., or as soon thereafter as this matter may be heard in Courtroom 9D of the above-entitled Court, located at 350 W. 1st Street, Los Angeles, California 90012, Plaintiff and Counterclaimant New York Marine and General Insurance Company (“NY Marine”), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, will and hereby does move the Court to dismiss the Amended Counterclaim filed by Defendant and Counterclaimant Amber Heard (“Heard”) in its entirety without leave to amend upon the ground that it fails to state a claim upon which relief can be granted.

Specifically, Heard’s allegations, together with both facts of which judicial notice may be taken and facts set forth in the NY Marine policy, correspondence and other matters referenced in the Amended Counterclaim and/or upon which the Amended Counterclaim is predicated and which may therefore be considered under the “Incorporation by Reference” doctrine by the Court in determining this motion, show that Heard was defended in the underlying action filed in Virginia and retained counsel from that jurisdiction to defend her after which, some six months later, she tendered to NY Marine which in turn appointed the same counsel to defend her. Since the action was pending in Virginia and under Virginia law defense counsel appointed by an insurer only has the insured as a client, NY Marine’s proffered defense did not create a “conflict of interest.” Thus, Heard’s refusal to “fully accept” the defense proffered by NY Marine under a general reservation of rights because she found it “impossible” to do so did not give rise to an obligation on its part to also appoint independent defense counsel. Furthermore, NY Marine’s reservation of rights was a “general” reservation of rights which does not trigger the right to independent counsel. Consequently, Heard’s failure to “fully accept” that proffered defense relieved NY Marine of any further obligation to defend her. In addition, the Amended Counterclaim fails to allege that any of the “defense costs” which Heard seeks to recover from NY Marine were incurred at its “request” as required by the NY

1 Marine's policy's CPL Endorsement or were not otherwise "voluntarily" incurred by
 2 Heard in violation of the NY Marine policy's CPL Endorsement's "no-voluntary
 3 payments" provision. Accordingly, Heard's allegations are insufficient to establish
 4 that NY Marine is liable for breach of contract or bad faith.

5 Alternatively, pursuant to Rule 12(e) of the Federal Rules of Civil Procedure,
 6 NY Marine will and hereby does move this Court for an Order requiring a more
 7 definite statement (1) as to Heard's allegation in paragraph 24 of her Amended
 8 Counterclaim that she incurred "hundreds of thousands of dollars in defense costs not
 9 paid by any insurer" in that such allegation fails to assert that such costs were incurred
 10 either at the "request" of NY Marine or that her incurrence of those costs was not
 11 voluntary in violation of the "no voluntary payments" provision contained in the CPL
 12 Endorsement, or (2) why its appointment of counsel previously retained by Heard
 13 made it "impossible" for her to "fully accept" that defense once NY Marine agreed to
 14 defend through that same firm.

15 Also alternatively, pursuant to Rule 12(f) of the Federal Rules of Civil
 16 Procedure, NY Marine will and hereby does move this Court for an order striking
 17 both (1) the allegations of paragraph 25 asserting the existence of a conflict of interest
 18 and an entitlement to independent counsel, and (2) the allegations of paragraphs 7-16
 19 of the Amended Counterclaim as immaterial and impertinent in that (a) those
 20 statements are self-evidently "marketing" "puffery" which cannot form the basis of a
 21 cause of action as a matter of law, and (b) the Amended Counterclaim fails to allege
 22 that Plaintiff was contemporaneously aware that any of those statements at the time
 23 she purchased the policy, much less that she relied upon them in doing so.

24 This Motion is based on this Notice of Motion and Motion, the accompanying
 25 Memorandum of Points and Authorities, the Request for Judicial Notice together with
 26 exhibits attached thereto, and the Declaration of James P. Wagoner together with its
 27 exhibits which the Court is requested to consider under the "incorporation by
 28 reference " doctrine, and all papers and pleadings of record on file in this case, and

1 such additional authority and argument as may be presented at or before the time this
2 Motion is heard or submitted.

3 This Motion is made following the conference of counsel pursuant to L.R. 7-3,
4 which took place on December 2, 2022, January 26, 2023, and January 30, 2023.
5

6 Dated: February 10, 2023

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

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8
9 By: /s/ James P. Wagoner
James P. Wagoner
Nicholas H. Rasmussen
Graham A. Van Leuven
10 Attorneys for Plaintiff New York Marine and
11 General Insurance Company
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PROOF OF SERVICE

New York Marine and General Insurance Company v. Amber Heard
USDC Central District Case No. 2:22-cv-04685-GW-PD

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Fresno, State of California. My business address is 7647 North Fresno Street, Fresno, CA 93720.

On February 10, 2023, I served true copies of the following document(s) described as **PLAINTIFF AND COUNTER-DEFENDANT NEW YORK MARINE AND GENERAL INSURANCE COMPANY'S NOTICE OF MOTION AND MOTION TO (1) DISMISS HEARD'S COUNTERCLAIM PURSUANT TO RULE 12(B)(6), OR (2) ALTERNATIVELY, FOR A MORE DEFINITE STATEMENT PURSUANT TO RULE 12(E), AND (3) TO STRIKE CERTAIN ALLEGATIONS PURSUANT TO RULE 12(F)** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on February 10, 2023, at Fresno, California.

/s/ Marisela Taylor
Marisela Taylor

SERVICE LIST

New York Marine and General Insurance Company v. Amber Heard
USDC Central District Case No. 2:22-cv-04685-GW-PD

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Courtesy Copy – Via Email

*Attorneys for Plaintiff and
Counterclaimant Travelers Commercial
Insurance Company in USDC Central
District Case No. 2:21-cv-05832-GW,
consolidated for pre-trial purposes*